Ang Chee Huat v Engelbach Thomas Joseph

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-141-94
ZAKARIA YATIM, MAHADEV SHANKAR AND ABU MANSOR JJCA
20, 28 MARCH 1995

Civil Procedure *— Injunction — Mareva injunction — Whether conditions necessary for Mareva injunction satisfied — Whether there was a risk of assets being dissipated before judgment*

In late 1988, the respondent, a foreigner residing in the United States of America, had sought the assistance of his good friend, the appellant, to find a suitable piece of land to set up a sealant plant in Johor Bahru. The respondent alleged that the appellant advised him to incorporate a local company in Johor Bahru and obtain pioneer status for the company. The appellant then induced the respondent to give him RM500,000 to be put in fixed deposit alleging that in order to obtain pioneer status, the Malaysian Industrial Development Authority had to be satisfied that the company had a deposit of RM500,000 in a Malaysian bank. The appellant also represented to the respondent that he had bought a piece of land known as HS(D) 6373, Lot No 4170, Mukim Tebrau, District of Johor Bahru measuring 522,720sq ft ('the land') to be owned jointly by the appellant and the respondent at the price of RM2.1m by utilizing the RM500,000 as part payment of the purchase price. The appellant informed him that the land had to be registered solely in the name of the appellant as the respondent was a foreigner and then executed a declaration of trust with himself as trustee of the undivided half share of the land in favour of the respondent. In fact, the land was registered in the name of Sepi Sdn Bhd of which the appellant was a shareholder and director. On 20 November 1990, the appellant wrote to the respondent informing him that he had failed to acquire the land and that the declaration of trust was of no effect. The respondent obtained a Mareva injunction against the undivided half share of No 270, Jalan Serampang, Pelangi, Johor Bahru of which the appellant was the registered owner and 210,000 shares valued at RM1 each in Sepi Sdn Bhd owned by the appellant. The judicial commissioner granted the order, on an inter partes application by summons-in-chambers, on the grounds that: (i) the respondent had shown that he had a good arguable case; (ii) the assets of the appellant were within jurisdiction; and (iii) there was a real risk that the appellant would or might dispose of his assets within jurisdiction. The appellant appealed, denying the respondent's allegations and alleging that there had been no agreement between him and the respondent to buy the land.

Held, dismissing the appeal:

(1) The three essential requirements for granting a Mareva injunction had been considered by the judicial commissioner. With regard to the requirement of a good arguable case, after reading the pleadings and the affidavits, the respondent has shown that he has a good arguable case in respect of his claim for the return of the RM500,000.

(2) On the second requirement, neither party had made any submission on that requirement before the judicial commissioner. In any event, one of the grounds for granting the order was that the assets of the appellant were within jurisdiction. It was not in dispute that the appellant was the registered owner of an undivided half share of No 270, Jalan Serampang, Pelangi, Johor Bahru and that he also owned 210,000 shares valued at RM1 each in Sepi Sdn Bhd.

(3) There were clear inconsistencies between the declaration of trust and the title to the land, and between the appellant's statement of defence and his affidavit in reply. Having considered the evidence, the conduct of the appellant was lacking in probity and honesty. In the circumstances, there was a real risk that the assets of the appellant would be dissipated should the respondent succeed at the trial.

[Bahasa Malaysia summary

Pada lewat tahun 1988, responden, seorang asing yang bermastautin di Amerika Syarikat meminta pertolongan sahabat karibnya, iaitu perayu, untuk mendirikan sebuah loji pembuat bahan pengadang di Johor Bahru. Responden mengata bahawa perayu telah menasihatkan responden untuk memperbadankan sebuah syarikat tempatan di Johor Bahru dan mendapatkan taraf perintis untuk syarikat itu. Perayu kemudiannya mendorong responden untuk memberikannya RM500,000 untuk disimpan dalam simpanan tetap dengan mengata bahawa untuk mendapatkan taraf perintis, Lembaga Kemajuan Industri Malaysia perlu berpuas hati bahawa syarikat itu mempunyai simpanan sebanyak RM500,000 dalam sebuah bank Malaysia. Perayu juga telah membuat representasi kepada responden bahawa beliau telah membeli sebidang tanah yang dikenali sebagai HS(D) 6373, Lot No 4170, Mukim Tebrau, Daerah Johor Bahru seluas 522,720 kaki persegi ('tanah itu') untuk dimiliki bersama oleh perayu dan responden pada harga RM2.1 juta dengan menggunakan RM500,000 tersebut sebagai bayaran sebahagian harga belian itu. Perayu memberitahu responden bahawa tanah itu perlu didaftarkan hanya atas namanya sahaja kerana responden adalah orang asing dan kemudiannya menyempurnakan satu deklarasi amanah dengan dirinya sebagai pemegang amanah separuh bahagian tanah yang tidak dibahagikan itu bagi responden. Pada hakikatnya, tanah itu didaftarkan

A atas nama Sepi Sdn Bhd di mana perayu adalah seorang pemegang saham dan pengarah. Pada 20 November 1990, perayu telah menulis surat kepada responden memberitahunya bahawa beliau telah gagal memperolehi tanah itu dan bahawa deklarasi amanah itu tidak berkesan. Responden mendapatkan injunksi Mareva terhadap separuh
B bahagian yang tidak dibahagikan yang dikenali sebagai No 270, Jalan Serampang, Pelangi, Johor Bahru yang dimiliki oleh perayu sebagai pemunya berdaftar dan 210,000 saham bernilai RM1 setiap satu dalam Sepi Sdn Bhd yang dipunyai oleh perayu. Pesuruhjaya kehakiman telah membenarkan perintah itu, di atas permohonan inter partes melalui saman dalam kamar, atas alasan bahawa:
C (i) responden mempunyai kes kukuh yang boleh dihujahkan; (ii) aset perayu terletak di dalam bidang kuasa; dan (iii) terdapat risiko benar bahawa perayu akan atau mungkin melesapkan asetnya dalam bidang kuasa. Perayu telah membuat rayuan dengan menafikan pengataan responden dan mendakwa bahawa tidak terdapat sebarang perjanjian
D antara beliau dan responden untuk membeli tanah itu.

Diputuskan, menolak rayuan itu:

(1) Tiga keperluan penting untuk membenarkan injunksi Mareva telah dipertimbangkan oleh pesuruhjaya kehakiman. Berhubung dengan keperluan bahawa mesti terdapat kes kukuh yang boleh
E dihujahkan, setelah membaca pliding dan afidavit, responden telah menunjukkan bahawa beliau mempunyai suatu kes kukuh yang boleh dihujahkan dari segi tuntutannya untuk kepulangan RM500,000 itu.

(2) Atas keperluan kedua, kedua-dua pihak tidak membuat apa-apa
F penghujahan mengenai keperluan itu di hadapan pesuruhjaya kehakiman. Bagaimanapun, satu daripada alasan untuk membenarkan perintah itu adalah bahawa aset perayu terletak di dalam bidang kuasa. Tidak dipertikaikan bahawa perayu adalah pemunya berdaftar separuh bahagian yang tidak dibahagikan
G dalam No 270, Jalan Serampang, Pelangi, Johor Bahru dan bahawa beliau juga memiliki 210,000 saham bernilai RM1 setiap satu di dalam Sepi Sdn Bhd.

(3) Terdapat perkara yang jelas tidak konsisten di antara deklarasi amanah dan dokumen hakmilik tanah itu, dan di antara pernyataan pembelaan perayu dan afidavit jawapan beliau. Setelah
H mempertimbangkan keterangan itu, kelakuan perayu didapati tidak mempunyai kejujuran dan keikhlasan. Dalam keadaan sedemikian, terdapat suatu risiko benar bahawa aset perayu akan dilesapkan sekiranya responden berjaya dalam perbicaraan itu.]

I **Notes**

For cases on Mareva injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1662—1701.

Cases referred to

Amixco Asia Pte Ltd v Bank Negara Indonesia 1946 [1992] 1 SLR 703 (folld)

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)

Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 (folld)

Appeal from: Civil Suit No 22–157 of 1993 (High Court, Johor Bahru)

Wu Tern Yue (*Hua Kia Fook*) (*KF Hua & Partners*) for the appellant.
Jeyakumar Sundralingam (*Reginald Vallipuram & Co*) for the respondent.

Cur Adv Vult

Zakaria Yatim JCA: This is an appeal against the decision of Mohd Ghazali JC, who made an order on 6 August 1994 granting a Mareva injunction against the defendant ('the appellant'). He made the order after hearing the plaintiff's ('the respondent') application by summons-in-chambers inter partes.

The respondent is a foreigner who resides at No 100, Clark Street, Keyport, New Jersey, United States. The appellant's last known address is at No 270, Jalan Serampang, Pelangi, Johor Bahru.

The following facts are not in dispute. For some years prior to 20 June 1989, the appellant and the respondent were good friends. They visited each other at their respective homes and travelled overseas together. In late 1988, Elastomers Ltd, a company of which the respondent is a director, was considering locating its plant in Johor Bahru. The company is carrying on the business of selling sealants. The respondent sought the assistance of the appellant to find a suitable location for his company's plant in Johor Bahru. The appellant advised the respondent to incorporate a local company in Johor Bahru. The respondent sought the appellant's assistance to find an accountant to set up the local company. On the appellant's recommendation, Messrs Lau & Co (now known as Messrs Park & Associates) was appointed by the respondent. Early in 1989, the appellant arranged for the respondent to meet the assistant director of the Malaysian Industrial Development Authority ('MIDA') in Johor and thereafter the respondent began to collect some data that was necessary to meet the requirements of MIDA. The respondent contends that the appellant advised him that it would be beneficial for him to obtain pioneer status for the company. The appellant and the respondent went around to look for a suitable piece of land to set up the respondent's factory. The land known as HS(D) 6373, Lot No 4170, Mukim Tebrau, District of Johor Bahru was at one point of time registered in the name of Sepi Sdn Bhd, a company in which the appellant is a shareholder and director. The appellant encashed cheques given to him by the respondent totalling

A RM500,000. The appellant also signed an undated declaration of trust. The appellant is the registered owner of an undivided half share of all that piece of land comprised in HS(D) 40767, known as Lot No PTD 18779 together with a building erected thereon known as No 270, Jalan Serampang, Pelangi, Johor Bahru, which is the appellant's place of residence and B which is the subject of the Mareva order. The appellant is also the registered owner of RM210,000 shares in Sepi Sdn Bhd, the shares are also the subject matter of the Mareva order.

The disputed facts are as follows. The respondent alleges in the statement of claim that the appellant had induced him to part with the sum C of RM500,000 to the appellant by making a representation to him that in order for the appellant to obtain pioneer status for the company to be incorporated, MIDA had to be satisfied that Elastomers had a deposit of RM500,000 in a Malaysian bank. The appellant made the representation orally to the plaintiff on 15 May 1989. The respondent contends that the said representation was false and untrue and that MIDA did not impose D such a requirement. By means of the said representation, the respondent did cause to be handed over to the appellant to be kept on fixed deposit in an account with a Malaysian bank, a sum of RM500,000. The said sum of RM500,000 was not put on a fixed deposit account by the appellant although the appellant had misled the respondent into believing that the E appellant had done so as he remitted to the respondent in the United States some moneys as purported interest derived on the fixed deposit account. The respondent further alleges that the appellant falsely represented to him that the appellant had bought a piece of land known as HS(D) 6373, Lot No 4170, Mukim Tebrau, District of Johor Bahru containing an area of 522,720sq ft to be owned jointly by the appellant and F the respondent at the price of RM2.1m and that the appellant had utilized the sum of RM500,000 given by the respondent to him as part payment of the purchase price. According to the respondent, the appellant informed him that the land the appellant had purchased had to be registered solely in the name of the appellant as the respondent was a foreigner. The G appellant executed a declaration of trust constituting himself a trustee of the undivided half share of the said land in favour of the respondent. The respondent alleges that the declaration of trust is null and void in that the defendant is not the registered owner of the land known as HS(D) 6373, Lot No 4170 Mukim Tebrau. The respondent claims that he has lost the said sum of RM500,000 and has suffered loss and damage.

H The appellant in his statement of defence denies the respondent's allegations. He says that there was no agreement between them to buy a piece of land. He admits, however, that the land known as HS(D) 6373 for Lot 4170 was at one point of time registered in the name of Sepi Sdn Bhd in which he was a shareholder and director.

I At the end of the inter partes hearing, the learned judicial commissioner allowed the respondent's application for a Mareva injunction subject to the usual undertaking as to damages. He granted the Mareva injunction on the grounds that:

(a) the respondent had shown that he had a good arguable case; A

(b) that the assets of the appellant were within jurisdiction; and

(c) that there was a real risk that the appellant would or might dispose of his assets within jurisdiction.

I think that the learned judicial commissioner has considered the three essential requirements for granting a Mareva injunction. See *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 at p 155 and *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143. B

With regard to the requirement of a good arguable case, I am satisfied, after reading the pleadings and the affidavits, that the respondent has shown that he has a good arguable case in respect of his claim for the return of the RM500,000. C

On the second requirement, the learned judicial commissioner considered that the requirement was not an issue as neither party had made any submission on that requirement before him. In any event, one of his grounds for granting the order was that the assets of the appellant were within jurisdiction. It is not in dispute that the appellant is the registered owner of an undivided half share of all that piece of land comprised in HS(D) 40767 known as Lot No PTD 18779 together with a building erected thereon known as No 270, Jalan Serampang, Pelangi, Johor Bahru. A certified true copy of the search made at the Registry of Companies dated 5 April 1994, which is exhibited to the affidavit of Thomas Joseph Engelbach affirmed on 15 June 1994 and marked as TJE8 shows that the appellant owns 210,000 shares in Sepi Sdn Bhd. The value of each share is RM1. This fact is not in dispute. D E

The next point is whether, on the evidence, there is a real risk of the assets being dissipated or removed. A declaration of trust in respect of a piece of land under HS(D) 6373 for Lot No 4170, Mukim Tebrau was signed by the appellant purportedly in the presence of an advocate and solicitor. The document is not dated. The declaration also states that the area of the land is approximately 522,720sq ft. According to the land title, a copy of which is exhibited to the plaintiff's affidavit, the lot number is 4173 and the area of the land is only 21,660sq ft. It is clear that the declaration of trust refers to a different lot number, ie 4170 (and not 4173) and to a much larger land area, ie 522,720sq ft (and not 21,660sq ft). In para 2 of the declaration of trust, he claims to be the registered proprietor of the said land. But in the land title, the registered proprietor of the said land was at all material times Sepi Sdn Bhd. In his statement of defence, the appellant denies that he executed the declaration of trust. In para 22 of his affidavit in reply, he however admits signing the document. He says that he does not know the person, Lee Fei Fung, who witnessed his signature. According to him, the person who witnessed his signature was one Encik Mohd Yassin bin Ibrahim. Encik Mohd Yassin bin Ibrahim affirmed an affidavit on 8 June 1994 and exhibited to that affidavit is the same declaration of trust. In that exhibit, the appellant's signature was, however, witnessed by Encik Yassin. It seems strange to me that the F G H I

A appellant's signature on declaration of trust, which is exhibited to the respondent's affidavit was witnessed by Mr Lee Fei Fung whereas the document exhibited to Encik Mohd Yassin's affidavit was witnessed by Encik Mohd Yassin. Mr Lee Fei Fung, in his affidavit affirmed on 8 June 1994, denies that the signature purported to be signed by Lee Fei Fung is
B his signature. It is significant to note that on 20 November 1990, the appellant wrote to the respondent the following letter:

> Attn: Mr Engelbach Thomas Joseph
> 100 Clark Street
> Keyport
> C New Jersey
> 07735 USA
>
> Dear Sir
>
> I refer to the declaration of trust made by me in your favour in respect of our joint intended acquisition of HS(D) 6373 Lot No 4170, Mukim Tebrau,
> D Johor Bahru, Johor. As the aforesaid acquisition fails I am giving you this notice to confirm that the declaration therefore fails and [is] of no effect as between us.
>
> Thank you.
>
> Yours faithfully
> —Sgd—
> E Ang Chee Huat

In this letter, he says that he has failed to acquire the said land but in the declaration of trust he states that he is the registered proprietor of the said land.

F The learned judicial commissioner made the following finding in his grounds of judgment:

> ... it is my finding that the plaintiff has shown that there is a danger that the defendant's available assets will be dissipated to prejudice the plaintiff's claim ... To me, his conduct shows that he is a trustee who intends to default and will do what he can to avoid having to meet his obligation ...
> G The defendant's letter to the plaintiff dated 20 November 1990, revoking the trust only serves to confirm that his actions are akin to a long term fraud by the build-up of confidence to be followed by default ... I have taken into account the defendant's evidence as well as the plaintiff's and I cannot find anything to support his opposition to the application — there is solid evidence that the probity of the defendant cannot be relied on.

H I agree with the finding of the learned judicial commissioner. Having considered the evidence, I am of the view that the conduct of the appellant in this matter is lacking in probity and honesty. In the circumstances, I conclude that there is a real risk that the assets of the appellant will
I dissipate should the respondent succeed at the trial. I feel that I am justified in arriving at this conclusion in the light of the decisions in the following two cases: in *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261, Peh Swee Chin J (as he then was) said at p 264:

The second condition laid down by Mustill J [in *Ninemia Maritime Corp v Trave SGmbH & Co KG* [1984] 1 All ER 398], duly approved by the Federal Court [in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62], was also satisfied, ie there was solid evidence that the probity of the defendant could not be relied on. The undisputed detention and use of the plaintiff's equipment, without the consent of plaintiff, and above all, the undisputed detention of 98% of progress payments No 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard to the agreed retention sum with which the Mareva injunction was concerned; in other words, the defendant would, far more probably than not, dissipate the agreed retention sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.

In *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703, the Singapore Court of Appeal decided that there was overwhelming objective evidence of prima facie dishonest conduct on the part of Amixco/Kosen/Quek, and in the full circumstances of the case, a real risk of Amixco dissipating their assets to avoid satisfying BNI's judgment.

I respectfully agree with the passage in Peh Swee Chin J's judgment quoted above and with the decision of the Singapore Court of Appeal in *Amixco*'s case. For the reasons stated above, I dismiss the appeal with costs.

I am authorized by my learned brother, Mahadev Shankar JCA, to say that he concurs in this judgment.

Abu Mansor JCA: I have had the benefit of reading the judgment in draft of my brother, Zakaria Yatim JCA. The facts of this case are as enumerated by him and are not in dispute.

I agree with his decision that the appeal should be dismissed with costs, as the learned judicial commissioner Mohd Ghazali JC had correctly considered all ingredients before granting the Mareva injunction, the most important of which was whether there was any real danger of the assets being dissipated. I agree with the answer found by him that there was such a danger as the appellant by his conduct was already leading to that trend. As I have said, I concur and hereby dismiss this appeal with costs.

Appeal dismissed.

Reported by Sarojah Arianayagam